Supreme Court, U.S.
FILED
APR 27 2010
OFFICE OF THE CLERK

No. 09-885

IN THE

Supreme Court of the United States

STANDARD INSURANCE COMPANY,
Petitioner,

v.

MONICA LINDEEN, State Auditor,
ex officio Commissioner of Insurance,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The decision below holds that states are free to eliminate through a ban on discretionary clauses the ability of ERISA insured plan creators to ensure that plan administrators' decisions are reviewed by the federal courts with so-called *Firestone* deference. As the petition established, such state regulation eliminating *Firestone* deference and requiring universal *de novo* review squarely conflicts with the requirements of ERISA as explicated by this Court in cases like *Metro. Life Ins. Co. v. Glenn*, 554 U.S. ___, 128 S. Ct. 2343 (2008).

Respondent contends that this elimination of *Firestone* deference does not conflict with ERISA, because such deferential review purportedly is "'not a cornerstone of the ERISA system.'" (Br. in Opp. at 9 (quoting Pet. App. 19a). According to respondent (and the Ninth Circuit below), *Firestone* deference simply is not an essential part of ERISA's remedial scheme, and states are therefore free to eliminate it.

This reasoning is fundamentally at odds with this Court's cases, which firmly establish that *Firestone* deference *is* a key component of ERISA's carefully calibrated remedial scheme, and that a system of uniform *de novo* review irreconcilably conflicts with that scheme. Indeed, *Glenn* could not have been clearer that "near universal review by judges *de novo*—*i.e.*, without deference—of the lion's share of ERISA plan claims" *would* be contrary to Congress' intent in passing ERISA. 128 S. Ct. at 2350. And this Court's recent decision in *Conkright v. Frommert* emphasizes that *Firestone* deference is a critical component of the ERISA scheme, which "preserves

the 'careful balancing' on which ERISA is based." 559 U.S. ___, No. 08-810, slip op. at 9 (2010). In short, contrary to respondent and the Ninth Circuit, eliminating such deference *does* conflict with ERISA's carefully calibrated remedial system.

The opposing briefs also highlight the importance of the issue and the imminent threat to the ERISA policies *Firestone* deference serves. Respondent's *amicus* National Association of Insurance Commissioners ("NAIC") asserts a nationwide interest of state regulators in banning discretionary clauses, and trumpets its accelerating success in instituting such bans—citing 16 states as already having "adopted some type of prohibition against discretionary clauses." (NAIC Br. at 14-15 & n.4.)

The policies NAIC's members seek to vindicate, moreover, conflict with those of ERISA. Key to ERISA is its balancing of the interest in "fair and prompt" remedies against the interest in "encouragement of the creation of [employee benefit] plans," *Conkright*, slip op. at 9 (internal quotation marks omitted), and *Firestone* deference directly serves the latter part of this balance. *See id.* at 9-10; *Glenn*, 128 S. Ct. at 2353 (opinion of Roberts, C.J.). The state regulators, focusing solely on one side of the balance, oppose this federal view of discretionary clauses, pronouncing them—and the accompanying *Firestone* deference—"inequitable, deceptive and misleading to consumers." (NAIC Br. at 14.)

Given this nationwide threat to core ERISA policies, the serious conflict between the Ninth Circuit's decision and this Court's cases, and the ongoing confusion in the lower courts about the

perceived tension between *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002) and *Glenn* (and now *Conkright*), review by this Court is appropriate.

I. THE NINTH CIRCUIT'S DECISION CANNOT BE SQUARED WITH THIS COURT'S CASES

ERISA's remedial system embodies a "'careful balancing' between ensuring fair and prompt enforcement of rights in a plan and the encouragement of the creation of such plans." *Conkright*, slip op. at 9 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)). This delicate remedial balance has "extraordinary preemptive power" that precludes state-law efforts to alter it. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004) (internal quotation marks omitted). As the petition explains (at 10-15), the availability of deferential review under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), is central to this balance, and state efforts to eliminate such deference by banning discretionary clauses are therefore preempted.

Respondent and NAIC dispute the existence of any ERISA policy favoring the availability of discretionary clauses, arguing that *Firestone*'s acceptance of *de novo* review as a default standard—*i.e.*, when no discretionary clause is present—indicates that there is no ERISA policy favoring the availability of *Firestone* deference. (Br. in Opp. at 8-9; *accord* NAIC Br. at 11-12). In this, they echo the core rationale of the Ninth Circuit—to wit, that ERISA is not offended by a state's effective elimination of *Firestone* deference, because this "merely forces ERISA suits to proceed with their default standard of review." Pet. App. 16a.

This argument is deeply misguided. First, it conflates the question whether there is an ERISA policy making deferential review the *default* standard—and *Firestone* holds that there is not—with the very different question whether there is an ERISA policy in favor of giving plan creators the *option* of providing for deferential review. As explained in the petition (at 12-14), it is the availability of this option, rather than the default standard, that is important to ERISA's remedial balance: so long as it is available to employers to whom deferential review is important, it has the desired effect of "encourag[ing] employers to provide medical and retirement benefits to their employees through ERISA-governed plans—something they are not required to do." *Glenn*, 128 S. Ct. at 2353 (opinion of Roberts, C.J.).

Second, respondent's argument is untenable in light of this Court's cases establishing that the availability of *Firestone* deference *is* an essential component of the ERISA scheme. *Glenn* held that congressional intent precluded any rule that "could bring about near universal review by judges *de novo*—*i.e.*, without deference—of the lion's share of ERISA plan claims denials." 128 S. Ct. at 2350. And *Conkright* confirmed that—far from being a matter of indifference from an ERISA standpoint—"*Firestone* deference protects the[] interests [underlying ERISA] and, by permitting an employer to grant primary interpretive authority over an ERISA plan to the plan administrator, preserves the 'careful balancing' on which ERISA is based." Slip op. at 9.

Respondent is equally misguided in arguing, based on the Sixth Circuit's illogical reading of *Glenn*

in *Am. Council of Life Insurers v. Ross*, 558 F.3d 600 (6th Cir. 2009), that *Glenn* can be read as supporting the result below. According to *Ross*, *Glenn*'s insistence on accounting for administrator conflicts of interest *within* the framework of *Firestone* deference somehow implies that states are free to entirely *eliminate Firestone* deference:

> If, as *Glenn* . . . holds, it is consistent with ERISA to account for [a] conflict of interest in reviewing a plan administrator's decision [for abuse of discretion], it is difficult to understand why a State should not be allowed to eliminate the potential for such a conflict of interest by prohibiting discretionary clauses in the first place.

(Br. in Opp. at 7 (quoting *Ross*, 558 F.3d at 609)).

This reasoning is incoherent. Far from signaling that *Firestone* deference was not essential to the ERISA remedial scheme, this Court emphasized in *Glenn* that, even in the case of a conflict of interest, *Firestone* deference must be preserved; "overturn[ing] *Firestone* by adopting a rule that in practice could bring about near universal review by judges *de novo*," the court held, would be contrary to congressional intent. 128 S. Ct. at 2350. As *Conkright* put it, *Glenn* establishes that *Firestone* deference is so important that even "a systemic conflict of interest does not strip a plan administrator of deference." *Conkright*, slip op. at 5.

Finally, NAIC argues that state regulators must be permitted to continue their campaign against discretionary clauses and *Firestone* deference in

"furtherance of the role of state regulators in protecting consumers by promoting the payment of legitimate claims." (NAIC Br. at 13.) This argument, however, merely highlights the incommensurability between the policies embodied in state bans on discretionary clauses and "the guiding principles [this Court] ha[s] identified underlying ERISA." *Conkright*, slip op. at 9. In contrast to NAIC's seemingly exclusive focus on "promoting the payment of legitimate claims," ERISA's remedial scheme balances that interest "'against the public interest in encouraging the formation of employee benefit plans.'" *Davila*, 542 U.S. at 208 (quoting *Pilot Life*, 481 U.S. at 54). And contrary to the state regulators' view of discretionary clauses and *Firestone* deference as "inequitable" (NAIC Br. at 14), ERISA views such deference as critical to "preserv[ing] the 'careful balancing' on which ERISA is based." *Conkright*, slip op. at 9.

II. THE ISSUE PRESENTED IS HIGHLY IMPORTANT AND REQUIRES PROMPT RESOLUTION BY THIS COURT

1. Nothing in the opposing briefs contests the tremendous importance of the issue squarely presented by this case. As set forth in the petition (at 18-21), a large and growing number of states has moved to adopt bans on discretionary clauses, thereby effectively nullifying in those states decisions like *Glenn* and *Conkright*, and profoundly affecting the creation and administration of ERISA plans across the country. As *amici* Associated Oregon Industries et al. describe in detail, twenty states—including four of the five most populous states—have already prohibited, or are currently considering the

prohibition of, discretionary clauses in insurance policies. (AOI et al. Br. at 9-20.) NAIC itself highlights 16 states that have already adopted such prohibitions. (NAIC Br. at 14.)

The list of states considering and adopting such prohibitions, moreover, continues to grow rapidly. *See, e.g.,* Kentucky Department of Insurance Advisory Opinion 2010-01 (Mar. 9, 2010) ("It is the Department's position that discretionary clauses deceptively affect the risk purported to be assumed in any policy and as such, any forms containing discretionary clauses may be disapproved."). Subsequent to the decision below, such provisions have not shrunk from overtly aiming to nullify this Court's decisions in cases like *Glenn*. *E.g.*, N.Y. State Ins. Dept., Proposed Reg. 184, 11 NYCRR 222 (April 14, 2010) (citing *Glenn* and proposing ban on discretionary clauses on ground that *Firestone* deference renders coverage "illusory").

2. Although this Court may consider remanding this case for reconsideration in light of *Conkright*'s unambiguous recognition that—contrary to the decision below—the availability of *Firestone* deference is essential to the "careful balancing" of the ERISA remedial scheme, the more appropriate course would be to hear this case on the merits.

As noted above, the list of states banning discretionary clauses continues to grow, and—unless and until this Court removes those bans from the books—employers in the affected states forming insured ERISA plans will be deprived of the benefits of administrator discretion and *Firestone* deference. Likewise, the federal courts in those states can be expected to see an increase in challenges to ERISA

insurance benefit decisions, *cf. Glenn*, 128 S. Ct. at 2350-51, as well as increases in the complexity and expense of such cases. Any further delay in this Court's resolution of the issue pending a decision on remand will merely increase the extent of these harmful effects.

Moreover, even reconsideration in light of *Conkright* may not put to rest the confusion in the lower courts over this issue. As detailed in the petition (at 15-17), the result below—and the Sixth Circuit's decision in *Ross*—turned in significant part on the courts' erroneous but understandable reading of *dicta* in *Rush Prudential* as giving states broad license to eliminate *Firestone* deference. *E.g.*, Pet. App. 19a (quoting *Rush Prudential*, 536 U.S. at 387). That confusion—and the perceived tension between *Rush Prudential* and *Glenn* (and now *Conkright*)—can only be resolved by this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully Submitted,

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